Supreme Court, U.S.
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No. 04-1398

In The

Supreme Court of the United States

ROBBIE GOODMAN,

Petitioner,

v.

STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Criminal Appeals Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibit a State from proceeding with a subsequent trial upon the exact same evidence and base facts after the first trial ended with the State dismissing the case after jeopardy attached? The subsequent indictment differing only with the addition of one element.

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PETITION FOR WRIT OF CERTIORARI

Robbie Goodman respectfully petitions for a writ of certiorari to review the judgment of Texas Court of Criminal Appeals.

OPINION BELOW

The Court of Criminal Appeals of Texas denied relief sought by Petitioner in *Ex parte Robbie Goodman*, PD-1087-03 (Tex. Crim. App., delivered October 20, 2004, rehearing denied January 19, 2005). (See Appendix at p. A. 18)

This petition for writ of certiorari is due on April 19, 2005, and is timely filed. U.S. Supreme Court Rule 13.1

JURISDICTION

The Court of Criminal Appeals of Texas rendered its opinion on October 20, 2004. Petitioner timely filed his Motion for Rehearing, which was subsequently denied by the Court on January 19, 2005. The Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This Court has Jurisdiction to hear this petition under the Fifth and Fourteenth Amendments of the United States Constitution as well.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the Constitution of the United States provides: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . "

STATEMENT

Petitioner was indicted in Cause No. 14747 out of Cherokee County, Texas on the 27th day of August, 2001 for the offense of Theft over $200,000.00. (See Appendix at p. A. 19) Petitioner and the State of Texas announced ready on January 22, 2002 and a jury was sworn. Petitioner entered a plea of not guilty and the State proceeded with its opening statement and questioning of its first witness. After objections were made by Petitioner's counsel, the State moved to dismiss, over objection and said motion was granted by the Trial Court.

Subsequently, on January 28, 2002, the State of Texas reindicted Petitioner in Cause No. 14838 for the offense of Theft over $200,000.00, however, this indictment added aggregation as an element. (See Appendix at p. A. 20) Petitioner then filed a Petition for Habeas Corpus Seeking Relief from Double Jeopardy. A hearing was had on the 26th day of April, 2002 at which time the Court denied relief requested by Petitioner. (See Appendix at p. A. 15)

On appeal, the 12th Court of Appeals of Texas, relying on the "same elements" test announced in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932), held the indictments in Cause No. 14747 and 14838 did not allege the same offense for double jeopardy purposes. Their reasoning was that the subsequent

indictment contained an additional element not found in the first indictment. (See appendix at p. A. 13)

On review, the Court of Criminal Appeals of Texas reasoned that *Blockburger* was not "precisely applicable" to this case in that it only applies when one criminal act or transaction violates two distinct statutory provisions. Rather, the Court relied on its own reasoning in *Ex Parte Goodbread,* 967 S.W.2d 859 (Tex. Crim. App. 1998). Thereby reversing the Twelfth Court on its application of *Blockburger* and remanding the case to the trial level to determine which one of the underlying thefts that jeopardy attached. The Court ruled that the State of Texas may attempt to prove any number of the aggregated theft's constituent thefts. (See Appendix at p. A. 7)

The Court of Criminal Appeals of Texas subsequently denied Petitioner's Motion for Rehearing. (See Appendix at p. A. 18)

REASONS FOR GRANTING THE WRIT

The decision by the Court of Criminal Appeals conflicts with this Court's established Fifth Amendment jurisprudence, *Blockburger v. United States,* 284 U.S. 299 (1932).

The decision by the Court of Criminal Appeals conflicts with this Court's established Fourteenth Amendment jurisprudence, *Benton v. Maryland,* 395 U.S. 784, 796 (1969).

EXPANSION OF ARGUMENT RELATING TO THE QUESTION PRESENTED

The indictment in Cause No. 14747 alleged theft over $200,000.00. As the State announced in its opening statement, this offense consisted of a series of thefts totaling $228,517.03 over a period of time. The indictment in Cause No. 14838 alleges Theft by Aggregation over $200,000.00 from May 1, 1999 until October 4, 2000. At the hearing on Appellant's Writ of Habeas Corpus, the State conceded that the second prosecution in Cause No. 14838 would consist of no additional evidence, witnesses or discovery material, not intended for or supplied in Cause No. 14747 to support the indictment which the State dismissed after jeopardy attached, thereby, causing the Petitioner to be acquitted. See, *Ramiriz v. State,* 171 Tex. Crim. 507, 352 S.W.2d 131, 133 (1961).

The evidence offered at the hearing on Appellant's Writ of Habeas Corpus consisted of all discovery material provided in Cause No. 14747 and additionally, some 332 delivery tickets, which under the State's theory, add up to $228,517.03. This being the only evidence the State is relying on to prove theft over $200,000.00 in both cases.

In its opinion on page 3, the Twelfth Court of Appeals correctly sets out the offenses as defined in the Texas Penal Code as follows: (See Appendix at p. A. 12)

A person commits the offense of theft if he unlawfully appropriates property with the intent to deprive the owner of property. Tex. Pen. Code Ann. § 31.03(e)(7) (Vernon 2003). When an actor commits theft pursuant to one scheme or continuing course of conduct, the conduct may be considered as one offense and the amounts aggregated

in determining the grade of offense. Tex. Pen. Code Ann. § 31.09 (Vernon 2003).

Blockburger states that the test is whether *each offense* requires proof of an additional element which the other does not. Tex. Pen. Code Ann. § 31.03(a)(e)(7) requires proof of no additional elements, as required by Tex. Pen. Code Ann. § 31.09.

With regard to the allegations in the present case, the uncontroverted evidence is that both indictments relied upon the same specific acts of theft. The Appellant cannot be prosecuted for any acts of theft alleged in the second indictment upon which the jury could have convicted him in the first indictment. *Rodriquez v. State* (Tex. Crim. App. 2003 No. 290-01). Further, where it is impossible to determine which offense the jury convicted, or could have convicted the defendant, all such acts of theft are jeopardy barred.

On its face, the first indictment in this matter gives no guidance as to which "constituent thefts" are barred. In *Goodbread* and the cases cited therein, there were multiple offenses, all of which standing alone could be proven in the indictment. In the present case, there are no individual incidents which give rise to a first degree felony. The State would have to rely on the aggregation of all of the 300 plus indictments alleged to give rise to a first degree felony. Each separate indictment alleged, represents but a mere fraction of the $200,000.00 mark.

Additionally, *Goodbread* tells us to look to proof offered at trial. In the present case, this does nothing to narrow what is not jeopardy barred. As pointed out by the Court of Criminal Appeals, the State failed to prove any theft at the initial trial. In the present case, we have only

the evidence admitted at Appellant's double jeopardy writ hearing, in which the State of Texas, by and through its District Attorney of Cherokee County testified that the offense being prosecuted in the first indictment consisted of all of the more than 300 separate alleged incidents. This being the same and only evidence to be used in the second trial. Even with the consideration of this evidence, there is no narrowing of the incidents to which jeopardy attached

So what guidance do we have? As Judge Meyers pointed out in his concurring opinion in *Goodbread* supra, Majority opinion at 860-61.

> "But if we have to look to the proof at trial to determine what is jeopardy barred, then to what has jeopardy 'attached' before proof is offered? After all, we know jeopardy attaches in a jury trial the moment the jury is empaneled and sworn. Is the majority suggesting jeopardy does not attach until proof is offered? Certainly not, but **we are not enlightened in this regard.**"

Additionally, in its opinion, the Court of Criminal Appeals instructs the Trial Court to determine which separate incident jeopardy attached by determining which most closely resembled the theft in the first indictment. Thereby, requiring the Trial Court to make determination after the fact in the absence of any Constitutional guidelines or protections. (See Appendix at p. A. 7)

CONCLUSION

The departure from the well-established double jeopardy jurisprudence by the Court of Criminal Appeals of Texas has undermined the Constitutional guarantee against double jeopardy. This Court should grant the petition for writ of certiorari to decide this question.

Respectfully submitted,

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